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## THE LIEN OR EQUITABLE THEORY OF THE MORTGAGE—SOME GENERALIZATIONS.

THE questions of law which are most difficult to answer are the questions of fundamental theory. They are most difficult to answer upon reason because they are so far reaching in their application as to defy complete understanding and they are most difficult to answer upon authority by reason of the fact that the courts, we will not say because of the difficulty of the questions, but because of that commendable conservatism which forbids saying more than is necessary to reach a decision, rarely touch upon them. That the law of mortgages may offer peculiar resistance to generalization, is portended by occasional remarks of the courts. Thus Baron PARKE, speaking of the mortgagor, says, "He can be described only by saying he is a mortgagor."<sup>1</sup> And Lord DENMAN remarks, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other, in any other terms than those very words."<sup>2</sup> All this is offered by way of preface and apology, for the writer is going to assail a fundamental question in the law of mortgages and he would have his efforts judged in the light of their inherent difficulty.

The question is—What is the nature of the rights of a real property mortgagee in those jurisdictions which adopt the lien or equitable theory<sup>3</sup> of the mortgage? In one sense this question calls

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<sup>1</sup> *Litchfield v. Ready*, 20 L. J. Ex. 51.

<sup>2</sup> *Higginbotham v. Barton*, 11 Ad. & El. 307, 314.

<sup>3</sup> There are probably no two States in which the law of mortgages is the same in all particulars, but they may be broadly classified into three groups: (1) those in which the mortgage is held to pass the legal title to the land at its execution; (2) those in which it is held to pass the title upon default, and (3) those in which it is held to pass no title until foreclosure. The first view is commonly called the legal or title theory and the last, the equitable or lien theory, while the second, which is maintained in only a few States, has no distinctive name. This discussion is addressed to the law

for a full statement of the law of mortgages but that, of course, is not the sense in which the writer puts it. He means by it to put a broader and more scientific question—a question, be it at once confessed, of jurisprudence—yet a question which has an important bearing on, if it is not in fact conclusive of, several specific problems in the law, which will be examined in a subsequent paper.

In discussing a question of jurisprudence it is first necessary to settle upon a scheme of classification and a few technical terms. And for this we cannot do better than to accept HOLLAND'S classification and terminology.

One "grand division of rights turns upon the limited or unlimited extent of the person of incidence, by which phrase we mean the person against whom the right is available."<sup>4</sup> It is the division between rights *in rem* and rights *in personam*. A right *in rem* "is capable of exercise over its object, '*in rem*,' without reference to any one person more than another"<sup>5</sup> is, in the common phrase, available "against the whole world."<sup>6</sup> A right *in personam* is only "available '*in personam* (certam),' against a definite individual"<sup>7</sup> or individuals.

Of rights *in rem*, the only ones which will interest us are the "proprietary rights" which are "extensions of the power of an individual over portions of the physical world."<sup>8</sup> "The essence of all such rights lies not so much in the enjoyment of the thing, as in the legal power of excluding others from interfering with the enjoyment of it."<sup>9</sup> "In its lowest form it is a right of Possession, in its highest form a right of Ownership. The former is indeed included in the latter but may exist apart from it."<sup>10</sup> "The right of ownership is unlimited only in comparison with other rights over objects,"<sup>11</sup> being always limited by rights of the state, of the public and of adjacent owners and in some other ways not necessary to mention.<sup>12</sup>

"One or more of the subordinate elements of ownership, such as a right of possession, or user, may be granted out while the residuary right of ownership \* \* \* remains unimpaired. The elements of

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of the third class of States but it applies to the second so far as concerns the status of the mortgagee before default and the arguments in favor of a legal lien apply there *a priori*.

<sup>4</sup> Holland, *Jurisprudence* (10th Ed.), 139.

<sup>5</sup> *Ibid.* 140.

<sup>6</sup> *Ibid.* 161.

<sup>7</sup> *Ibid.* 139, 140.

<sup>8</sup> *Ibid.* 183.

<sup>9</sup> *Ibid.* 184.

<sup>10</sup> *Ibid.* 184.

<sup>11</sup> *Ibid.* 199.

<sup>12</sup> See *ibid.* 199-202.

the right which may thus be disposed of without interference with the right itself, in other words, which may be granted to one person over an object of which another continues to be the owner, are known as '*jura in re aliena*.' The permanently important species of such rights are 'Servitude' and 'Pledge.'<sup>13</sup> The servitudes of English law include easements and profits but not licenses or the so-called equitable easements, which are merely rights *in personam*.<sup>14</sup> The servitudes "enable the person entitled to them to enjoy the physical qualities of a thing."<sup>15</sup> The pledge "merely enables a person who is entitled to receive a definite value from another, in default of so receiving it, to realize it by eventual sale of the thing which is given to him in pledge. The right of sale is one of the component rights of ownership and may be parted with separately in order thus to add security to a personal obligation. When so parted with, it is a right of pledge, which may be defined as a 'right *in rem*, realizable by sale, given to a creditor by way of accessory security to a right *in personam*.'<sup>16</sup> It follows from this definition that the pledge right subsists only as long as the right *in personam* to which it is accessory; that the right extends no further than is necessary for the sale of the thing pledged, not to its use or possession; and that the realization of the value of the thing by sale puts an end to the title of the original owner."<sup>17</sup>

"The objects aimed at by a law of pledge are, on the one hand, to give the creditor a security on the value of which he can rely,

<sup>13</sup> Ibid. 213, 214.

<sup>14</sup> See *ibid.*, 216-222, and Tiffany, Real Property, §§ 304 and 348.

<sup>15</sup> Holland, Jurisprudence, 222.

<sup>16</sup> Ibid. 222. It is obvious that this definition does not take account of the real security which is not collateral to a personal obligation but stands alone, a form of security which is unusual but is well recognized in our law. *Gregory v. Van Voorst*, 85 Ind. 108; *Rice v. Rice*, 4 Pick. 349; *Niggeler v. Maurin*, 34 Minn. 118; *Mooney v. Byrne*, 163 N. Y. 86. Cases such as *Henley v. Hotaling*, 41 Cal. 22, apparently contra, are explained by *Glover v. Payn*, 19 Wend. 518, and *Flagg v. Mann*, 2 Sumner (U. S.) 486, 533. It may be well to say that there cannot be a mortgage without a debt, for it is of the essence of this, as of all other forms of security, that it is given "for the merely subsidiary purpose of enabling the person to whom it is granted to make sure of receiving a certain value to which he is entitled; if not otherwise, then at all events by means of the right in question," Holland, Jurisprudence, 222. But the debt is not necessarily owed by any person; the right to receive the certain value may have no corresponding duty resting on any person to give it. In such a case it is convenient to personify the res and consider it as owing the debt but this a fiction and in truth there is no obligation but merely this peculiar property in the res, called a "pledge." Even where there is no personal obligation to pay the debt, there may, of course, be (and this is the full extent of the creditor's rights as to the res in the case of an equitable lien) a personal obligation concerning the application of the res to the payment of the debt, but this is quite a different thing. As the security which is not collateral to a personal obligation is unusual and is, except for certain well defined purposes, of the same character as the other, we may leave it out of consideration in this paper.

<sup>17</sup> Holland, Jurisprudence, 223.

which he can readily turn into money and which he can follow even in the hands of third parties; on the other hand, to leave the enjoyment of the thing in the meantime to its owner and to give him every facility for disencumbering it when the debt for which it is security shall have been paid."

"The methods by which these objects can best be attained, and the degree in which they are attainable, must vary to some extent with the nature of the thing pledged. Probably the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor, accompanied by a condition for its retransfer upon due payment of the debt \* \* \* such is the English mortgage, of lands or goods, at the present day, except in so far as its theory has been modified by the determination of the Court of Chancery and of the Legislature to continue, as long as possible, to regard the mortgagor as the owner of the property. Lord MANSFIELD was unsuccessful in attempting to induce the English Courts of Common Law to take the same view."

"Another method, which must always have been practiced, is that in which the ownership of the object remains with the debtor, but its possession is transferred to the creditor. This was called by the Romans, '*pignus*.'"<sup>18</sup> It is represented in our law by the "pledge" of chattels—a use of the term "pledge" manifestly narrower than that of Mr. HOLLAND. Since we have undertaken to adopt his terminology for the purposes of this discussion we will follow him here in the broad, generic use of "pledge."

"Yet another mode of creating a security is possible, by which not merely the ownership of the thing but its possession also remains with the debtor. This is called by the Roman lawyers and their modern followers '*hypotheca*.'"<sup>19</sup> We may substitute, for this Latin word, its English cognate, hypothecation, a term which is not unknown in our law and has been frequently applied<sup>20</sup> to the mortgage of real property which does not convey the legal title. Hypothecation is otherwise represented in our law by maritime liens.

The term "*rights in personam*" we have already defined. It ordinarily suggests to the lawyer rights which in no way concern any *specific things*, e. g., a right to receive a *certain sum* of money. But we also have rights *in personam* which do concern specific things. Thus a contract vendee of land has a right *in personam*

<sup>18</sup> Ibid. 223, 224.

<sup>19</sup> Ibid. 225.

<sup>20</sup> Kortright v. Cady, 21 N. Y. 343, 365; The Nestor, 18 Fed. Cas. 9, 12. And see Cal. C. C., § 292, and the Codes of other States copied therefrom.

against his vendor to have the specific land conveyed to him. To be sure we speak of him as having equitable ownership of the land, but this is merely a convenient expression for his right, in equity, to compel his vendor, or any person acquiring the land from his vendor with notice or without value, to convey the ownership of the land to him. Of the same nature are the rights of a *cestui que trust* and of all other persons having equitable estates or interests in specific things. The personal character of equitable rights results necessarily from the rule that equity acts only *in personam*. Its chief importance lies in the rules of *bona fide* purchase by which one who acquires legal rights, rights *in rem*, in a thing for value and without notice of an equitable interest in it takes free from that equity.<sup>21</sup>

While equitable rights concerning specific things are *always* rights *in personam*, legal rights concerning specific things may be either rights *in personam* (e. g., the rights at law of the contract vendee of land), or rights *in rem* of which latter, the several kinds that are of importance to us in this discussion have been classified above.

Let us now restate our question in these terms of jurisprudence. Has the real property mortgagee, under the lien theory, rights *in rem* or mere rights *in personam*?

We can say at once that he may, and usually does, have rights *in personam* in the form of a personal debt of his mortgagor. But herein his rights are not essentially different from those of any creditor, and we mention them only to lay them aside as requiring no further discussion.

His rights in or concerning the land are those which we will examine. Of these, it is obvious that, if he has mere rights *in personam*, they are equitable rights, which for our purposes do not need to be further characterized, but which would, of course, be called an equitable lien; while, if he has rights *in rem*, they are legal rights, of the kind which we have agreed to call "pledge" and of the particular variety which we have agreed to call "hypothecation," but which will be sufficiently distinguished from the other alternative of equitable lien by the term "legal lien." We can therefore restate our question thus: Has the real property mortgagee, under the lien theory, a legal lien or a mere equitable lien?

A third view of the mortgagee's rights has some support in judicial utterance, viz., that the mortgagee has but a *chose in action*

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<sup>21</sup> For further discussion of the character of equitable estates see *The Young Mechanic*, 30 Fed. Cas. 873, 874; Maitland, *Equity*, 111 ff., and Pomeroy, *Equity*, §§ 428-431. Our courts of equity frequently act *in rem* with the aid of statute but to that extent they are administering, not equity, but statute law.

and no interest in the land either legal or equitable. But the writer believes that this theory cannot seriously compete with the other two theories stated above, and he will not consider it in the body of this discussion, but will reserve it for treatment at the end of this paper.

It will be well to preface that, in most of the problems of mortgage law, the distinction between legal and equitable liens is entirely immaterial and that, in the vast majority of cases in which this distinction would otherwise be important, the recording acts control and by their operation place the legal and the equitable lien upon the same footing. It is doubtless due to this circumstance that the question we are to discuss was not conclusively settled long since.<sup>22</sup>

In a later article, the writer will attempt to answer the question propounded by an examination of the modern decisions bearing upon it. But the material for that purpose is so meager and the result of it so inconclusive that it will be profitable for us first to direct our attention to some considerations of a broader and more general nature, to which this paper will be devoted.

Let us approach our question from the historical side. Without inquiring whether such a theory was ever applied without qualification,<sup>23</sup> it is sufficiently accurate for the purposes of modern law to regard as the original common law theory of the mortgage the view that a mortgage was just what it purported to be, a conveyance on condition subsequent, the legal effect of which was determined by the ordinary rules of conditional estates in real property. In other words, the original common law theory of the mortgage was that there were no mortgages. Those conveyances which the Court of Chancery called mortgages the courts of common law called conditional conveyances and these courts had no special rules for them which could be called a "law of mortgages." As to the operation of the rules of conditional estates upon the mortgage, it is enough to say that, before default, the mortgagee was vested with an estate upon condition subsequent while the mortgagor had a right of re-entry upon performance of the condition and that, after default, the mortgagee had an absolute estate while the mortgagor had no rights in the land whatever.

While this condition obtained in courts of law, the Court of Chancery, conceiving that the rules of law as applied to mortgages worked hardships upon the mortgagor, began to interfere between the parties. The position of the Chancellors was that, while the

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<sup>22</sup> The fusion of legal and equitable procedure under the codes has, of course, no bearing on the question except in the indirect and unconscious way in which it tends in all directions to break down the distinction between law and equity.

<sup>23</sup> For a survey of the authorities at law, before Lord Mansfield's time, see Trowbridge, *Reading on Mortgages*, 8 Mass. 551, and Viner's *Abridgment*, title mortgage.

mortgage was in the form of a conveyance on condition subsequent, it was intended merely as a security for a loan and that the operation of the instrument under the rules of law worked a forfeiture, against which equity should relieve, at the suit of the mortgagor, by compelling the mortgagee to reconvey upon payment of his debt. At first this sort of relief was granted only in cases of unusual hardship, but presently it became a matter of course and of right in all cases. At this point, the mortgagee found that his legal rights, which hitherto had been entirely adequate to his purposes, were so no longer, for he was liable at any time to be haled into the Court of Chancery and compelled to relinquish those rights. For relief from this situation he was forced to seek the Court of Chancery, himself, and that court, recognizing the hardship of his position, or perhaps perceiving that the right to redeem could not be indefinitely extended without seriously impairing the usefulness of mortgages, granted a decree cutting off or foreclosing the mortgagor's equitable right to redeem, and leaving the mortgagee's legal title absolute.

The right of the mortgagor to redeem the land in equity constituted, of course, an equitable estate in the land, which was called the "equity of redemption." Under the rule that equity follows the law, this equitable estate, like all others, possessed many of the characteristics of legal estates, viz., it descended to the heir, could be conveyed or devised and could be cut up into lesser estates, and in general, could be dealt with in the same manner as a legal estate, always subject, of course, to the rights of the mortgagee. On the other hand, the mortgage was regarded, in equity, primarily as a security. The debt was the principal and the mortgage a mere accessory. The debt and the beneficial interest in the mortgage could therefore be transferred by assignment without a conveyance of the land, and passed as personal assets to executors or administrators and not to heirs or devisees.

This is substantially the equitable doctrine of mortgages as it stood at the middle of the eighteenth century.<sup>24</sup> And at that time these doctrines, by reason of the practical supremacy of equity over law within the field of its activity, came to be, in spite of their limitations as creating mere personal rights, the really substantial "law of mortgages," so recognized everywhere except in courts of law.

In this state of divergence between law and equity, Lord MANSFIELD began a series of equitable innovations upon the common

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<sup>24</sup> For a survey of the authorities in equity, before Lord Mansfield's time, see Trowbridge, *Reading on Mortgages*, 8 Mass. 551, Viner's *Abridgment*, title *Mortgage*, and Pomeroy, *Equity*, § 1180.



law. In 1760, in the case of *Martin v. Mowlin*,<sup>25</sup> construing a will, he said, "A mortgage is a *charge* upon the land; and whatever would give the *money*, would carry the estate in the land *along with it*. The estate in the land is the *same thing* as the money due upon it. It will be *liable to debts*; it will go to *executors*; it will pass by a will not made with the solemnities required by the *statute of frauds*. The *assignment of the debt*, or *forgiving it*, will draw the land after it, as a consequence; nay, it would do it, though the debt were forgiven only by *parol*; for the right to the land would follow, notwithstanding the statute of frauds." After decisions of similar import in *Ren v. Bulkeley*,<sup>26</sup> in 1779, and *Eaton v. Jacques*,<sup>27</sup> in 1780, we come, in 1781, to the much cited case of *King v. St. Michaels*.<sup>28</sup> This was a case of pauper settlement. In the course of his opinion Lord MANSFIELD said, "If the estate on which a pauper resides is substantially his property, *that* is sufficient, whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner."

These views of Lord MANSFIELD were not accepted by the English courts of law and the law of England today regards the mortgagee as having an absolute legal title to the mortgaged land, after default, and the mortgagor as having a merely equitable title.<sup>29</sup> And, in so far as they reduce the interest of the mortgagee to a mere lien, these views have been rejected by those courts of this country which hold the title theory of the mortgage. But these same courts follow Lord MANSFIELD in so far as he recognized the mortgagor as the true owner, at law as well as in equity. The two positions regarding the rights of the mortgagor and the mortgagee are reconciled by saying that the mortgagor is the owner against all the world except the mortgagee but that as between the two the latter is the owner.<sup>30</sup>

But while Lord MANSFIELD's views were thus rejected in England, and but partially accepted in those of our States, which hold the title theory of the mortgage, the courts of New York and, after them, the courts of the majority of our States have followed Lord

<sup>25</sup> 2 Burr. 969.

<sup>26</sup> Doug. 292.

<sup>27</sup> Doug. 455.

<sup>28</sup> Doug. 630.

<sup>29</sup> See Maitland, *Equity*, 281. And see Lord Redesdale's strictures upon Lord Mansfield in *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 65.

<sup>30</sup> See Pomeroy, *Equity*, §§ 1186, 1187 and cases cited.

MANSFIELD'S views to their full extent, if they have not in fact gone beyond them. By their decisions they have made a body of mortgage law which, while it is not harmonious in all its details, is in complete accord in denying that the mortgage conveys the legal title to the land before foreclosure and which is therefore broadly distinguished from the original common law view of mortgages and from the law of the "title" States and may, for the purposes of this paper, be considered as a uniform body of law to be called the lien or equitable theory of the mortgage.

It will be desirable to examine a few of the leading cases upon this theory. The first case of importance in New York is the case of *Johnson v. Hart*,<sup>31</sup> decided by the Court of Errors in 1802. It was upon a bill in chancery to foreclose a mortgage. The mortgagee had endorsed the note to the complainant, by way of collateral security for a loan, and had delivered the mortgage to him without assignment. The defendant demurred for want of parties, the mortgagee not being joined. It was held by the court that the mortgagee was a necessary party because his assignment was not absolute but by way of security. KENT, J., in the course of his opinion, after citing with approval the case of *Martin v. Mozlin*, *supra*, said, "By the transfer, then, of the note to Hart, the mortgage went with it, and the same interest passed in the one as in the other. Had this been an absolute transfer, there could have been no good reason for requiring Green to be a party to the suit, because he had no further interest in the subject. He could not be considered as having any longer even the estate at law in him."

Passing by other decisions in equity, the first decision at law dealing with this question was in the case of *Jackson v. Willard*,<sup>32</sup> decided by the Supreme Court in 1809. This was an action of ejectment in which it was decided that an execution could not be levied upon lands mortgaged to the defendant in such execution. KENT, C. J., in the course of his opinion, said, "Mortgages have been principally the subject of equity jurisdiction. They have been considered in those courts, in their true nature and genuine meaning; and the rules by which they are governed are settled upon clear and consistent principles. The case is far different in a court of law; and we are constantly embarrassed between the force of technical formalities, and the real sense of the contract. The language, however, of the modern cases, is tending to the same conclusions which have been adopted in equity; and, whenever the nature of the case would possibly admit of it, the courts of law have

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<sup>31</sup> 3 Johns. Cas. 322.

<sup>32</sup> 4 Johns. 41.

inclined to look upon a mortgage, not as an estate in fee; but as a mere security for a debt. Lord HARDWICKE said, in the case of *Richards v. Sims*, (Barnard, Chan. Rep. 90), that the courts of law had then begun to consider mortgages in that light, and that a discharge of the debt, even by parol, was considered as a discharge of the mortgage; so that, in an ejectment upon the mortgage, evidence that the debt was satisfied would defeat the estate in the land, which shows, he says, 'that even the law considers the debt as the principal, and the land as an accident (*sic*) only.' The real nature of a mortgage, in the equity sense of it, has been repeatedly recognized in the courts of law, since the time of Lord HARDWICKE; and it has been said, and repeated, that it was an affront to common sense, to say that a mortgagor in possession was not the real owner; that the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security." (Citing *Martin v. Morelin* and *The King v. St. Michaels*, *supra*, and other cases.)

The next case of importance is *Runyan v. Mersereau*,<sup>33</sup> decided in the Supreme Court in 1814. Extracts from the opinion of the court will be sufficient. "This was an action of trespass, *quare clausum fregit*. \* \* \* By the pleadings, the question presented to the court is, whether the freehold was in the plaintiff, who had purchased the equity of redemption, under the judgment against the mortgagor, or in *Joshua Mersereau*, the mortgagee.

"Courts of law, both here and in *England*, have gone very far towards, if not the full length of, considering mortgages, at law, as in equity, mere securities for money; and the mortgagee as having only a chattel interest. (Citing *King v. St. Michaels*, *supra*.) \* \* \* The light in which mortgages have been considered, in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he, of course, is entitled to judgment."

These cases show the inception of the lien theory in New York. It would be interesting and pertinent to our inquiry to trace step by step the progress of the new conceptions in that State and in all other States that have followed in its lead, but that would be beyond the scope of this article. We must content ourselves with a few quotations from modern leading cases.

In *Kortright v. Cady*,<sup>34</sup> decided in the New York Court of Appeals in 1860, COMSTOCK, J., says, "In the early history of the law of mortgage, the courts of equity, departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge or

<sup>33</sup> 11 Johns. 534.

<sup>34</sup> 21 N. Y. 343, 362, 365.

security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord REDESDALE observed (Mitf., 429): "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Such pre-eminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. (Citing *Martin v. Mowlin* and *King v. St. Michaels*, *supra*, and other cases).

"In this State, the rules of law and equity in regard to mortgages have never differed in any degree; it being the doctrine of both systems that a mortgage is but a personal interest merely. This proposition, in its full length and breadth, was determined in *Runyan v. Mersereau*, *supra*. \* \* \*

"There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone, by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from words rather than things. So we have the terms, "redemption" and "equity of redemption," which belonged to a system of law that gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive, and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale had in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until foreclosure, his estate, the day after a default,

is exactly what it was the day before. Controversies like the present would cease to arise, if the mere terms of the law were no longer confounded with its principles."

In *Ladue v. The Detroit & Milwaukee Railroad Co.*,<sup>35</sup> decided in the Supreme Court of Michigan in 1865, CHRISTIANCY, J., says, "That a mortgage in this State, both at law and in equity, \* \* conveys no title of the land to the mortgagee (especially since the statute of 1843, taking away ejectment by the mortgagee); that the title remains in the mortgagor until foreclosure and sale, and that the mortgage is but a security, in the nature of a specific lien, for the debt, has been already settled by the decisions of this Court. This is in accordance with the well settled law of the State of New York, from which our system of law in regard to mortgages has been, in a great measure, derived. \* \* \*

"A mortgage, then, being a mere security for the debt or liability secured by it, it necessarily results, 1st: That the debt or liability secured is the principal, and the mortgage but an incident or accessory; 2d: That anything which transfers the debt (though by parol or mere delivery), transfers the mortgage with it; 3d: That an assignment of the mortgage without the debt is a mere nullity; 4th: That payment, release, or anything which extinguishes the debt, *ipso facto* extinguishes the mortgage. (Citing authorities.) It will be seen from these authorities that some, if not all, of these incidents or characteristics of a mortgage are recognized by some of the courts which still hold the mortgage to be a conveyance of the estate—an idea, however, with which they are utterly inconsistent, as such incidents can only logically flow from the doctrine that the estate still remains in the mortgagor, and that the mortgage is but a lien for security of a debt."

In *McMillan v. Richards*,<sup>36</sup> decided in the Supreme Court of California in 1858, FIELD, J., says, "There is great diversity of opinion in the adjudged cases as to the rights of mortgagor and mortgagee, both before and after condition broken, arising from the different views taken of mortgages at law and equity, and the more or less extended application of equitable doctrines to contracts of this description in courts of law. \* \* \* The settled doctrine of equity is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or incumbrance, and that the equity of redemption is the real and beneficial estate in the land which may be sold and conveyed by the mort-

<sup>35</sup> 13 Mich. 380, 394, 395.

<sup>36</sup> 9 Cal. 365, 408, 410.

gagor, in any of the ordinary modes of assurance, subject only to the lien of the mortgagee. This equitable doctrine, established to prevent the hardships springing by the rules of law from a failure in the strict performance of the conditions attached to the conveyance, and to give effect to the just intent of the parties in contracts of this description, has been, in most of the States, gradually adopted by the courts of law, although in some instances to a limited extent only. The cases indicate a fluctuation between equitable and common law views of the subject, and a hesitation by the courts of law to carry the equitable doctrine to its legitimate results. \* \* \*

"The just and liberal doctrines of equity respecting mortgages have been adopted in this State, and asserted, either directly or indirectly, in repeated instances, by this court."

These cases show the principal features in the application of the lien theory. Of these we will have more to say hereafter. For the present let us observe what these cases show regarding the sources and general nature of that theory. They show, if indeed authority is necessary for these points, that the lien theory is a theory of law as distinguished from equity, that it is a development from and modification of the original common law theory and that it is a theory borrowed from and framed upon the doctrines of equity.

The new conception of the mortgage is often spoken of as the "equitable theory," but, whatever terms are used, the new theory is a theory of *law* promulgated by *courts of law*. For a court of equity, as late as the nineteenth century, to have advanced this theory as a novelty would have been absurd. Taking its shape from the then ancient doctrines of equity, the new theory of law was properly enough denominated an equitable theory just as rules borrowed by the common law from the civil law, such as those of confusion of goods, may properly be called civil law rules, but in either case the transplanted law is common law, and being law the rights recognized and enforced by it are legal rights as distinguished from equitable rights.

That the lien theory is a development from and modification of the original common law theory, in other words, that there is such continuity in the law of mortgages that the original common law may be considered as in force except in so far as it has been definitely changed by the new conceptions, is a matter not susceptible of authoritative proof. Naturally the courts in expounding the new conceptions have dwelt upon their radical divergence from and not upon their connection with the common law. But it is not the nature of our legal system, if it ever was of any legal system, to annihilate a whole body of established law and snatch from the blue wholly

new conceptions to fill the vacuum. Upon the contrary, legal reform, even when aided by statute, builds the new structure upon the old. This is nowhere more clearly shown than in those very cases which dwell most heavily upon the radical departure of the lien theory from the old common law, for they define their position by stating the points in which they differ from the common law and in so doing they make the link with the past an essential part of their law.<sup>38</sup> Of course when changes as radical as those here in question have been made we must not be hasty in drawing conclusions about the persistence of legal theories or rules, but neither must we ignore this principle.

Whether or not the lien theory is borrowed from and framed upon the doctrines of equity is a purely historical question—that is to say, there are no *a priori* considerations pointing conclusively to equity as the source of the new conceptions. As a matter of history, the cases with great uniformity show, as do the foregoing extracts, that such is the case. It will not be pretended that this is the sole source of the lien theory. Thus in many of our states this theory is rested in part upon a statute conferring the right of possession upon the mortgagor or denying ejectment to the mortgagee, before foreclosure,<sup>39</sup> but even here there is abundant evidence that the courts have designed to assimilate the law of mortgages to the doctrines of equity.<sup>40</sup>

If these positions will be conceded, we may proceed to consider what conclusions may be drawn from them.

If the new theory is a legal theory and the rights recognized and enforced by it are legal rights, the only question that remains is this—does the new theory simply elevate the mortgagor to the position of the real owner and degrade the mortgagee to the position of a lienor, or does it go the length of denying to the mortgagee any rights whatever in the land and making the mortgagor an absolute owner free from any claim of the mortgagee except a personal claim in the form of a debt and a personal claim, in the nature of a right of action on contract, to have the land subjected to payment of the debt?

If it be conceded that the law of mortgages in the lien States is a development from and modification of the old common law, our

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<sup>38</sup> See, for example, *Kortright v. Cady*, *supra*, and *Chick v. Willetts*, 2 Kas. 384.

<sup>39</sup> See, for example, *Ladue v. D. & M. Ry.* as quoted *supra*. In Michigan (and probably in some other States) the courts were committed to the title theory, *Stevens v. Brown*, Walk. Ch. 41, when the statute in question was enacted, but upon the basis of that statute changed to the lien theory.

<sup>40</sup> See *Ladue v. D. & M. Ry.* as quoted *supra*, and *Newton v. McKay*, as quoted *infra*.

question is, simply, how far the old common law has been changed. Reserving all attempt to answer this question in specific terms, let us here indulge in some generalizations. It is fair to assume that the change of law was due, not to idle fancy, but to serious dissatisfaction with the old law. And it is also fair to assume that the features of the old law with which dissatisfaction was felt are all comprised in the rigid application of the rules of law to the form of the mortgage in disregard of the intent of the parties. That this was the central idea in the reform is abundantly manifested by the judicial utterances quoted above, and elsewhere in case and text. The same result is reached if we consider the lien theory as transplanted equity, for the foundation of the equitable doctrines of mortgages has repeatedly been declared to be the doctrine that equity considers the intent and not the form. It is manifestly impossible to demonstrate that this was not only the central but the sole idea of the courts in adopting the lien theory, but it is submitted with confidence that all objections which have been, or could reasonably be, voiced to the old common law system, amount to this, that it regarded only form and ignored intent.<sup>41</sup> It is but a more specific statement of the objection, that it treated as a conveyance on

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<sup>41</sup> As a justification for the original interposition of equity in the mortgage transaction this line of argument in all its forms is fallacious. Courts of law, even in 1750, respected the intention of the parties to contracts and conveyances and, on the other hand, courts of equity as well as courts of law usually held that when parties had reduced a transaction to writing, especially when that writing took the form of a conveyance the terms of which had a well recognized meaning in the law, the intention of the parties was to be gathered from the writing. And, even though we regard this difficulty as purely technical and one which equity could set aside, who can say that prior to the innovations of equity the parties to a mortgage did not in fact intend what their instrument said? In truth the interposition of equity was not in the direction of enforcing the intention of the parties but in the direction of defeating their intention, of denying their freedom to contract and convey and of imposing upon them rules of law which they could in no manner control by agreement—all under the form of enforcing their intention, but in reality enforcing the intention which equity conceived that they, as enlightened Christians, ought to have. In this regard the doctrine of equity which declared the mortgage a mere security was of one piece with that which declared that agreements, however explicit, which clogged the equity of redemption were void. The true justification of this equitable innovation lies in the fact that lender and borrower are not usually on an equal footing and that the latter needs protection against the former. But this form of statement regarding the intention of the parties is a convenient form of expression which for practical purposes adequately represents the real position of equity and, being the form of expression always used by the courts to justify the equitable doctrines, it gives us the proper point of view from which to ascertain the scope of the doctrines so justified. And at the time of the adoption of the equitable doctrines by courts of law it had become true in fact that the parties to a mortgage did not intend a conveyance on condition but a mere security, for, while their transaction was still construed as the former in courts of law, it had long been construed as the latter in courts of equity and by reason of the practical supremacy of equity the parties could not well be taken to intend, in fact, anything else than the meaning which equity had put upon their transaction.



condition subsequent, a transaction which was intended only as a security. But if this is the sole grievance against the old common law is it not fully satisfied by degrading the mortgagor to the position of a legal lienor, "a pledgee" to use our terms of jurisprudence, and elevating the mortgagee to the position of general owner at law as well as in equity? Is there any legitimate purpose to subserve, or have the courts ever entertained any purpose which would be subserved, by further degrading the mortgagee to the position of an equitable lienor? If it were clear that the parties to a mortgage of land intend to create a merely equitable lien, it might be objectionable to treat their transaction as creating a legal lien. But who can say that the parties to a mortgage have any such intention? And, since their transaction is embodied in an instrument executed with all the solemnity necessary to create legal interests in land, if it does not clearly appear that their intention is otherwise, must we not assume that they intend to create a legal interest in the land?<sup>42</sup>

If it be conceded that the lien theory is in a general way borrowed from and based upon the doctrines of equity—in other words, that it is the result of a reform of the law in the direction of assimilating the rules of law to those of equity, it will be fair to state the general purpose of the reform to be, to place the parties to the mortgage in the same relative position at law which they had occupied in equity. We say, "in the same *relative* position," for it is obvious that they cannot be in exactly the same positions at law which they occupied in equity, unless all distinctions between law and equity are abolished, a condition to which we have not yet arrived. But the same relative position is attained by making the mortgagor the general owner at law and the mortgagee a pledgee at law, whereas to make the mortgagor an absolute owner at law and the mortgagee a merely equitable lienor is to make the relative position of the parties at law as far from that which they occupied in equity, as was their relative position when the mortgagee was the absolute owner at law and the mortgagor a merely equitable owner. Furthermore, it was not the

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<sup>42</sup> To follow up the reasoning of the preceding note, the question here should be, whether there is any reason why the parties ought to intend to create an equitable rather than a legal lien; whether a lender who refused to advance his money except upon a legal lien would be taking an unfair advantage of the necessities of the borrower; whether in recognizing and enforcing a legal lien any hardship is imposed upon the mortgagor. This question might properly be confined to the position of the mortgagor, for the doctrine of equity and the modern equitable doctrine of law enlarging the rights of the mortgagor and restricting those of the mortgagee have been designed for the protection of the mortgagor and not for the benefit of third persons. But in the second of these papers an attempt will be made to treat of the justice of the position herein advanced as it affects third persons.

effect of the equitable doctrine of mortgages to make the mortgagee a merely equitable lienor. For certain well defined purposes he was treated as a mere lienor but it was never denied in equity that he had the legal title to the land which he was free to use for the legitimate purpose of security—a doctrine which left him, in effect, with a legal lien. The most notable instance of this was in the application of the rules of *bona fide* purchase to the mortgagee, whose security was never impaired by *bona fide* purchase of the land from the mortgagor.<sup>44</sup> In this the “legal” mortgagee, by formal mortgage, was in a superior position to an “equitable” mortgagee, by contract to give a mortgage or by informal agreement, such as the deposit of title deeds. If, then, the lien theory degrades the mortgagee to the position of an equitable lienor, it will place him in a position, not only relatively lower with reference to that of the mortgagor, but absolutely lower than that which he occupied in equity. Furthermore the courts will have swept away all distinction between the formal “legal” mortgage and the “equitable” mortgage, consisting of a contract to give a mortgage or an informal transaction, and this without any apparent consciousness of such result, for decisions are abundant, in the lien States as well as in the title States, dwelling upon the equitable character of the latter class of transactions and carefully distinguishing them from the formal legal mortgage.<sup>45</sup>

It will not be pretended that the lien theory has not gone beyond the doctrines of equity in some respects. Thus while equity never restrained a mortgagee from obtaining possession by the action of ejectment,<sup>46</sup> but merely compelled him to account for the rents and profits of the land during the possession so obtained, in the lien States he is denied ejectment before foreclosure. But this rule, at least in so far as it denies ejectment after default,<sup>47</sup> is a statutory rule<sup>48</sup> and many courts have gone no further than a strict con-

<sup>44</sup> The respect of the English Court of Chancery for legal rights carried it the length of the doctrine of tacking. That doctrine has been definitely rejected in this country but, except in this particular and in those cases in which the recording acts control the American courts of equity have the same respect for legal rights as the English. See Pomeroy, Equity, § 735 ff.

<sup>45</sup> See Jones, Mortgages, § 162 ff. and cases cited. The similar distinction between a formal mortgage by a mortgagor having a legal estate and by one having a merely equitable estate would also be obliterated, as to which see Jones, § 172 ff. and cases cited.

<sup>46</sup> In *Schwarz v. Sears*, Walk. Ch. (Mich.) 170, this was expressly held.

<sup>47</sup> In New York it was held before the statute in question was enacted that the mortgagor was entitled to possession until default, a ruling which can only be reconciled with the doctrine of equity upon the other grounds hereinafter stated.

<sup>48</sup> The only lien States in which there is not a statute expressly denying possession or possessory actions to the mortgagee before foreclosure are Georgia, Kentucky, and Louisiana. For the attitude of the courts in the first two of these States, see *Loan Assn. v. Cole*, 26 Ga. 197, and *Wooley v. Holt*, 14 Bush, (Ky.) 788.

struction of the statute requires. Thus, while it is held that the mortgagee cannot maintain, against the mortgagor's ejectment, a possession forcibly obtained<sup>49</sup> (a necessary corollary to the statute unless violence is to be encouraged), it is held in many of the States that he can, after default, maintain a possession peaceably obtained.<sup>50</sup> Some States further restrict the mortgagee's right of possession to a right maintainable only upon the actual consent of the mortgagor, denying that the mortgage itself gives any right either to acquire or maintain possession, but even here, the rule is rested squarely upon the statutes, which are liberally construed instead of strictly as in other jurisdictions.<sup>51</sup> But, leaving aside the consideration that the rules regarding possession are statutory rules, must we not agree with Justice CAMPBELL<sup>52</sup> that "when the law of 1843 (denying ejectment to the mortgagee), was passed, the common law doctrine of mortgages had become so far modified by the rules of equity that the last innovation was almost a corollary of former ones. \* \* \* Where the estate in fee was regarded as belonging to the mortgagee, the possession belonged with it. When the fee was no longer regarded as passing, the possessory right became anomalous. It was an incident which had become severed from its principal, and which led to serious complications in settling the equities of foreclosure and redemption. The act of 1843 was the last thing needed to harmonize the law, and to place mortgages in fact, as they had long been in theory, in the condition of mere securities and chattel interests."

Others of the well established features of the lien theory involve no extension of the doctrines of equity other than that which necessarily results from the process of transplanting them to law, where they operate *in rem* and not merely in *personam*, a process bearing an interesting analogy to the operation of the statute of uses. Thus the rule that a payment of the debt extinguishes the mortgage is merely the legal equivalent of the doctrine of equity that payment left the mortgagee with a naked legal title which he held in trust for the mortgagor;<sup>54</sup> and the rule that an assignment of the mortgage debt carries the security bears the same relation to the rule of equity that an assignment of the debt without an assignment of the mortgage left the mortgagee a trustee of the legal title for the assignee of the

<sup>49</sup> The same is true of possession fraudently obtained, *Russell v. Ely*, 2 Black 575.

<sup>50</sup> See *Phyfe v. Riley*, 15 Wend. 248; *Madison Ave. Church v. Oliver*, 73 N. Y. 82; *Tallman v. Ely*, 6 Wis. 242; *Walters v. Chance*, 73 Kas. 680.

<sup>51</sup> See *Newton v. McKay*, 30 Mich. 380; *Rogers v. Benton*, 39 Minn. 39; *Nagle v. Macey*, 9 Cal. 426.

<sup>52</sup> In *Newton v. McKay*, 30 Mich. 380.

<sup>54</sup> See *Bates v. Johnson, Johns.* (Eng.) 304.

debt.<sup>55</sup> Even the rule of possession, while its results differ more conspicuously from those of the doctrines of equity than in some other cases, may be regarded as the legal equivalent of the doctrine of equity that the mortgagee held possession as a bailiff of the mortgagor.<sup>56</sup> These cases will suffice as illustrations of the principle. It is not sought to establish this relation as a fixed and invariable rule but merely to indicate a tendency in the law which creates a presumption against any radical departure from the rules of common law except in the direction of adopting the doctrines of equity, a departure which would be involved in holding the mortgagee's lien to be merely equitable.

If it be objected that a legal lien without possession, an "hypothecation" in our terms of jurisprudence, is an anomaly in our law, it may be answered that the treatment, as creating a mere lien, of what is in form a conveyance on condition subsequent, is itself anomalous and that the anomaly is certainly not made greater by treating it as creating a legal lien than by treating it as creating an equitable lien—but contrariwise. It may be further answered that a non-possessory legal lien is not wholly anomalous, as we have, not to go beyond our modern law, examples of it in judgment and execution liens and in mechanic's liens.<sup>57</sup> But conceding that a legal lien of this sort is to some extent anomalous in our law, is this not such an anomaly as, from the point of view of legal tradition, is to be expected in any radical reform of the law. And, from the point of view of jurisprudence, is not this anomaly, but a natural and logical step in the process of refining the pledge-idea? And would not the statutes denying ejectment to the mortgagee have been unnecessary and would not those statutes have received a liberal construction in all the States, were it not

<sup>55</sup> See *Young v. Miller*, 6 Gray (Mass.) 152.

<sup>56</sup> See *Parkinson v. Hanbury*, L. R. 2 H. L. 1, 15.

<sup>57</sup> These liens have been held not to proprietary interests in the land but merely "a part of the remedy afforded by law for the collection of the debt" and therefore subject to retroactive destruction by the legislature (a position which is disputable both on reason and authority. See 8 Cyc 900, 14 Cyc 1049-1050, 23 Cyc 1350-1352, and 27 Cyc 23 and cases cited) but, whatever the exact nature of these liens, it is important for our purpose that they are non-possessory legal liens.

These analogies are not strong. But on the other hand the only strictly possessory liens, are the pledge of chattels and the liens of bailees and vendors of chattels and the analog y of the real property mortgage to these is certainly no stronger.

After all, perhaps the strongest analogy is that of a mortgage of land operating under the title theory which is non-possessory in the sense that possession is not essential to its validity. It is said to convey a legal title but it is only a title held for the purpose of security and is not repugnant to the simultaneous existence of general legal ownership in the mortgagor. Must we not say that this "legal title" is merely a legal lien to which adhere, by force of legal tradition, certain elements of general ownership which are foreign to its true nature, among which is the right of possession? Can it be anything else except "in minds which derive their conceptions from words rather than things?" And can we not say that the interest of the mortgagee under the lien theory differs from

that in Anglo-American law the pledge has been chiefly represented by its ruder forms, as a result of which the essence of the pledge-idea has been obscured?

To any objection of a practical nature founded upon the importance of possession as notice, the recording acts would seem to give a complete answer.<sup>59</sup>

There is, of course, no anomaly in the conception of a real interest, a right *in rem*, in land which for some purposes is treated as personal property. There is an anomaly in the similar treatment of estates for years, an anomaly which can only be explained historically by reverting to a time when the classification of substantive law was based entirely upon the forms of action. But an interest in land existing solely for the purpose of securing, and being therefore accessory to, a debt<sup>60</sup> must for many purposes<sup>61</sup> follow its principal and be treated as personal property, "a chattel interest" as this lien is commonly called.

The same consideration, that the lien is a mere accessory to the debt, reconciles with the general conceptions of our law other features of this lien. Thus the rules that the lien passes with the debt and cannot be transferred without the debt and that whatever extinguishes the debt<sup>62</sup> extinguishes the lien flow from the general rule that the incident follows the principal, a rule which operates on a legal as readily as on an equitable lien.<sup>63</sup> In this connection an apparent difficulty arises upon the statute of frauds. If a mortgage creates an interest in the land, an assignment or a release of this interest might seem to be within the terms of the statute. But this difficulty is in no way obviated by calling the lien "equitable" for it is well settled that the statute applies equally to legal and equitable interests.<sup>64</sup> Thus, to go no further, the rights of a contract pur-

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that of the mortgagee under the title theory only in being shorn of those foreign elements and left a pure legal lien?

<sup>59</sup> The one case in which the recording acts do not adequately protect third persons, that of a severance of fixtures, etc., from the mortgaged land and their sale as chattels, will be examined in a subsequent paper.

<sup>60</sup> This condition, referred to here and in the following paragraphs, obtains as well when the debt is not a personal obligation as when it is. In either case the principal right is a right to receive a certain value and the lien exists for the purely collateral purpose of securing that right. See note 16, *supra*.

<sup>61</sup> To describe the purposes for which the lien is treated as personal property we can take over, almost verbatim, the happy expressions by which Mr. Maitland (*Equity*, 117) describes the purposes for which equitable estates are treated like legal estates—"as regards their internal character, as regards duration, transmission, alienation;" not as regards "their external side," with relation to the land and adverse claimants of the land.

<sup>62</sup> Discharge of the lien by tender and by the running of the statute of limitations against the debt, neither of which by well settled rules extinguish the debt, will be treated in a subsequent paper.

<sup>63</sup> And is as necessary in the one case as in the other, for there is no more reason that an equitable lien should follow the debt than that a legal lien should do likewise.

<sup>64</sup> The statutes of most states provide in explicit terms for assignments of trust

chaser of land cannot be assigned by parol.<sup>65</sup> The only satisfactory solution of this problem is to call the assignment or discharge of the mortgage which follows an assignment, payment or tender of the debt a transfer by operation of law,<sup>66</sup> the law which operates being, of course, the rule that the incident follows the principal. This, however, satisfies the statute for a legal as well as for an equitable lien.

Another apparent difficulty is involved in the rule that the mortgagee's rights are not subject to execution. If he has, in truth, a legal interest in the land, why should this not be subject to levy like other legal interests in land? Here again we find the solution in the fact that his interest in the land is but an accessory to the debt. Conceding that the levy is as effective as a voluntary conveyance to transfer the interest in the land, if it cannot reach the debt it will be a mere nullity, as would be a voluntary conveyance without an assignment of the debt, because the incident cannot be severed from the principal nor can the principal be drawn after the incident.<sup>67</sup> But by the common law an execution cannot be levied on a *chose in action*, and this rule still prevails in most of our States.<sup>68</sup> Where a *chose in action* can be levied on, a levy upon the debt or instrument representing it is effective to pass the security in accordance with the general rule regarding assignment.<sup>69</sup>

It might be profitable to extend this examination to all the features of the lien theory, but it would be beyond the scope of this paper. Enough has been said, it is hoped, to show that upon general principles the mortgagee has a legal lien, an "hypothecation," and that the principal features of the lien theory are in no wise repugnant to this position.

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estates but do not otherwise expressly cover equitable interests. It is usually held, however, that all equitable interests come within the general provision regarding assignments and surrenders of "any interest." The question is, of course, merely one of statutory construction.

<sup>65</sup> See *Getman v. Getman*, 1 Barb. Ch. 499; *Grunow v. Salter*, 118 Mich. 148; *Smith v. Clarke*, 7 Wis. 551.

<sup>66</sup> The courts seem not to have felt any serious difficulty from the statute of frauds. Where the point has been discussed it has usually been dismissed with the remark that the mortgage is merely "a chattel interest" or a "chose in action." If by the latter it is meant that the mortgagee has no interest in the land, legal or equitable, it is an untenable proposition as the writer will attempt to show in a subsequent paper. The former is a sound statement of the law but does not in itself obviate the statute. (Cf. the estate for years also a chattel interest but not assignable by parol.) The explanation offered in the text is supported by the opinion of Christiancy, J., in *Ladue v. D. & M. Ry. Co.*, quoted *supra*.

<sup>67</sup> See *Trimm v. Marsh*, 54 N. Y. 599, 607.

<sup>68</sup> 17 Cyc. 971. In most States obligations secured by mortgage may, subject to limitations, be reached by garnishment. See *Rood, Garnishment*, § 127.

<sup>69</sup> *Freeman, Executions*, § 118.